STANDARD CHARTERED BANK

v.

AWANG BIN AHMAT @ SUHAIMI

HIGH COURT, SANDAKAN
TUAN IAN H.C. CHIN JC
[O.S. NO. 5(24)-15 OF 1992]
15 FEBRUARY 1993

PRACTICE & PROCEDURE: Plaintiff making application for declarations - Whether in fact there is a dispute - Whether declarations sought necessary - Whether application should be granted.

The plaintiffs financed the purchase of the defendant's house and as security the defendant assigned his benefit of the sale and purchase agreement under which he purchased the house to the plaintiffs. The plaintiffs obtained judgment against the defendant on default of payment of the said loan and applied to Court for declarations *inter alia*;

(a) that the plaintiffs are the legal assignee of the property,
(b) that the plaintiffs be at liberty to sell the property by public auction.

The question that arose for determination was whether the declarations were in fact necessary in view of the fact that the plaintiffs had by the Loan Agreement cum Deed of Assignment clothed themselves with every conceivable powers with regard to the said property.

Held:

[1] There was no evidence that the defendant had ever disputed the fact that the plaintiffs are the legal assignee of the said property nor is there evidence that the defendant had disputed that the plaintiffs are entitled to sell the said property.

[2] There was no dispute in this case for the Court to determine. The plaintiffs can only come to Court if they had been hindered by the defendant after termination of the licence of the defendant to occupy the said property.

[Plaintiffs application dismissed with no order as to costs].

Cases referred to:
Re Clay [1919] 1 Ch. 66 (***refd***)
Chung Khiaw Bank Ltd. v. Hipparion (M) Sdn. Bhd. [1988] 2 MLJ 62 / [1988] 1 CLJ 164 (***dist***)

Legislation referred to:
Rules of the High Court 1980, O. 31, O. 89
Specific Relief Act 1950, s. 41

Other sources referred to:
The Declaratory Judgment, Zamir, p. 51

For the plaintiffs - Raymond Tan; M/s. Chin Lau Wong & Foo
For the defendant - Unrepresented

JUDGMENT

Ian H.C. Chin JC:

I. *Facts Of Case*

The facts are gleaned from an affidavit filed in support of the originating summons herein. The defendant purchased a residential house from a housing developer for which the title to the said house was not yet available. The plaintiffs financed the said purchase of the said house by lending to the defendant the principal sum of RM25,600. As security for the loan the defendant by a Loan Agreement Cum Deed of Assignment "absolutely assigns" to the plaintiffs the said house and the "full and entire benefit" of the sale and purchase agreement under which the defendant purchased the said house from the housing developer. The relevant parts of this Loan Agreement cum Deed of Assignment are reproduced here, taking note that the word "Company" refers to the plaintiffs and the word "Borrower" therein refers to the defendant:

> Whereas
>
> (a) By an agreement made the day and year stated in s. 3 of the Schedule hereto (hereinafter referred to as "the Sale Agreement") and made between the party whose name and description are stated in s. 4 of the Schedule hereto (hereinafter referred to as "the Vendor") of the first part and the party whose name and description are stated in s. 5 of the Schedule hereto (hereinafter referred to as "the Landowner" of the second part and the Borrower of the third part, the Vendor with the consent of the Landowner agreed to sell and the borrower agreed to purchase all that property which is more particularly described in the sale agreement and s. 6 of the Schedule hereto (hereinafter referred to as "the said property") at the price and on the terms and condition set forth in the Sale Agreement.
>
> (b) The borrower is desirous of obtaining from the bank a loan upon the security of an assignment of all the borrower's rights and

interest to the said property under the sale agreement which the bank agrees to grant on the terms and subject to the conditions hereinafter appearing.

(c) ...

(d) ...

Now it is hereby agreed as follows:

1. ...

2. ...

3. ...

4. ...

5. ...

6. ...

7. Assignment

For the consideration the borrower hereby Absolutely Assigns to the bank and the said property and the full and entire benefit of the sale agreement together with all rights and title and interest of the borrower therein. Provided Always that notwithstanding the assignment hereinbefore contained or any other provisions of this agreement the borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrower expressed and contained in the sale agreement.

8. ...

9. ...

10. Covenants in Respect of Property

(a) The borrower shall not use or permit to be used the said property for any other purpose except for residence only.

...

11. ...

12. ...

13. Events of Default

In the event that the borrower (or if the borrower shall be more than one person if any one of them) shall:

(a) make default in payment of any one or more of the monthly instalment or any interest thereon or other sums of money (whether principal or interest) herein agreed or covenanted by the borrower to be paid;

...

14. Powers of Bank upon Default

a Upon default by the borrower in the manner in clause 13 hereinbefore provided the bank shall be entitled to exercise all or any of the rights and powers following:

(a) the right to terminate the licence and take possession of the said property or any part or parts thereof;

b

(b) the right to let lease or demise the said property or any part or parts thereof for such tenancy or term of years at such rent and generally upon such terms as the bank in its absolute discretion shall think fit Provided Always that the bank may without prejudice to the right aforesaid continue to let lease or demise the said property to such occupants as shall have been consented to by the bank and shall be entitled to collect all rentals or such increased rental as the case may be and any other charges thereto notwithstanding any other provision of this agreement;

c

d (c) the right and power to sell and assign the said property as the absolute unencumbered owner thereof at such price or prices and in such manner as the bank shall in its absolute discretion think fit free from any interest of the borrower hereunder or otherwise and to apply the proceeds of sale on or towards the satisfaction of the loan and all principal and interest and other moneys due to the bank shall only pay to the borrower the balance of the proceeds of such sale or sales if any after deduction of such principal and interest and other moneys aforesaid and all the costs if any occasioned by such sale or sales and no assignee or purchaser from the bank shall be concerned to ascertain whether or not any such default has actually arisen so as to entitle the bank to exercise its power of sale or assignment.

e

f

And if the borrower shall and hereby expressly agrees covenants and undertakes to do and execute all acts deeds instruments and things which the bank may require or stipulate for the purpose of effecting and or completing anything and or any transaction mentioned in this clause.

g

15. ...

h 16. Vacant Possession

When the power of sale granted under clause 14 (c) hereof becomes exercisable by the bank the borrower hereby declares and agrees that the borrower shall give vacant possession of the said property to the bank or any other person authorised by it immediately on receiving written demand in that behalf from the bank.

i

...

20. Power of Attorney

For the consideration aforesaid the borrower hereby irrevocably appoints the Manager of the bank ... the attorney of the borrower ... to deal with the said property in any manner whatsoever...

When the defendant defaulted in the payment of the said loan the plaintiffs on 7 October 1991 obtained judgment in the Magistrates' Court against the defendant for a sum of RM24,355.17 with interest and costs. The judgment had not been satisfied.

The plaintiffs initially, to quote from the originating summons, "seek the determination of the Court in the following orders:

(a) that the plaintiffs are the legal assignee of the property known as Double Storey Terrace House, Lot No. 12, Block 35, Taman Rajawali, Mile 8, Labuk Road, Sandakan by virtue of a loan agreement cum deed of assignment dated 23 May 1988.

(b) that the plaintiffs be at liberty to sell by public auction on a date to be fixed by the court the above described property so arranged [assigned] to the plaintiffs under a loan agreement cum deed of assignment dated 23 May 1988 subject to a reserve price to be determined by a valuation report of a firm of licensed valuers towards full satisfaction of the judgment obtained by the plaintiffs against the defendants on 7 October 1991 for the sum of RM24,355.17 together with agreed interest at the rate of 8% per annum from 16 July 1991 to the date of judgment and further statutory interest at the rate of 8% per annum from the date of judgment to the date of payment and RM731 costs and if there by any surplus money; such surplus to be paid over to the defendant.

(c) the costs incurred and for to be incurred to this application and of the sale to be taxed and paid ourt [out] of the proceeds of the said sale; and

(d) that the plaintiffs shall be at liberty to bid at the auction and if successful, shall be allowed to deduct the amount of the judgment debt, interest and cost from the purchase price; and

(e) the defendant or their agents do quit and deliver vacant possession of the said property within seven (7) days from the date of service of the order herein."

The only affidavit in support of this application reads:

1. I am the counsel for the abovenamed plaintiffs in pursuing their claim against the abovenamed defendant. I am cognisant with the fact relating to the plaintiffs' claim against the defendant.

2. The defendant are justly and truly indebted to the plaintiffs in the sum of RM24,355.17 as at 7 October 1991 being the loan granted to the defendant together with interest thereon to assist the defendant in the purchase of one unit of Double Storey Terrace House described as Lot No. 12, Block 35, Taman Rajawali, Mile 8, Labuk Road, Sandakan. The plaintiffs had obtained a judgment against the defendant on 7 October 1991 for the said sum together with interest and costs. I exhibit herewith a true copy of the sealed judgment of the Court marked "CTK-1".

3. In consideration of the plaintiffs providing the defendant the said loan, the defendant have executed a loan agreement cum deed of assignment marked "CTK-2".

4. I am duly informed by the plaintiffs that the plaintiffs (defendant) has not make any payments at all towards settlement of the said sum due to the plaintiffs till this date and the said sum remains due and outstanding.

5. Upon the premises, I pray for an order in terms of the application filed herein.

II. *Hearing*

When this application was first heard on 15 September 1992 I remarked that the application appears misconceived upon which Counsel for the plaintiffs asked for an adjournment to prepare a written submission. The written submission was given some months afterwards, instead of the promised two weeks, and only after I had set 6 February 1993 for the continued hearing of this matter and on which date I heard further argument from Counsel for the plaintiffs while the defendant had no Counsel and had earlier said he will "leave the matter to the Court". At the hearing on 6 February 1993 Counsel for the plaintiffs before he proceeded with his argument made various applications to amend the originating summons, *viz*:

(a) to replace the words "under O. 31 of the rules of the High Court 1980" appearing in the originating summons with the words "under s. 41 of the Specific Relief Act 1950

(Act 137)"; and

(b) to replace the words "in the following orders" appearing in the originating summons with the words "on the following questions"

The proposed amendment (a) is necessary because, according to Counsel for the plaintiffs, no reliance, on the facts of this case, can be placed on O. 31 of the RHC 1980 and the amendment (b) is to comply with the prescribed Form No. 6 of the RHC 1980. Counsel for the plaintiffs also indicated to the Court that prayer (e), which asks for possession of the property, will not be pursued because the conditions laid down in O. 89 of the RHC 1980 had not been satisfied. I will regard the originating summons, after the proposed amendment as praying for a declaration that the plaintiffs are the legal assignee and that they are entitled to sell with the remaining two prayers being merely consequential upon them. I adjourned the hearing for a written ruling to be delivered which I now do.

III. *Conclusions*

I will proceed on the basis that the amendments to the originating summons which Counsel for the plaintiffs applied for had been made. The originating summons, despite the amendments, cannot succeed.

There is no evidence that the defendant had ever disputed the fact that the plaintiffs are the legal assignee of the said property nor is there evidence that the defendant had disputed that the plaintiffs are entitled to sell the said property. The affidavit evidence of the plaintiffs do not show that the defendant disputed or continues to dispute the fact that the plaintiffs are the legal assignee of the said property. There is also no evidence to show that the defendant disputes the plaintiffs are entitled to sell the said property. In fact there is no evidence that the plaintiffs had ever asserted that they are the legal assignee of the said property. There is also no evidence that the plaintiffs had been prevented by the defendant from selling the said property. The Court should not in such circumstances make any declaration. See Zamir on the Declaratory Judgment, p. 51 and *Re Clay* [1919] 1 Ch. 66. There is no dispute in this case for the Court to determine.

The plaintiffs had by the said Loan Agreement Cum Deed of Assignment clothed themselves with every conceivable powers with regards to the said property, including the sale or disposal otherwise of the said property in any manner they like. Not only that the plaintiffs cannot, because there is no dispute, but also because there is no need for them to seek the assistance of the Court. All the plaintiffs need do is to terminate the licence of the defendant to occupy the said property, recover possession and then sell the said property - all powers which are given to the plaintiffs by the defendant under the said Loan Agreement cum Deed of Assignment. The plaintiffs can only come to Court if they have been hindered by the defendant in the said process after the termination of the licence of the defendant to occupy the said property. I would for another reason in the exercise of my discretion refuse the application and it is this - the plaintiffs should not be allowed to come to Court to ask for various declarations when the same were never disputed and as a result thereof would unfairly cause the defendant to bear unnecessary legal costs and expenses.

I was referred to the case of *Chung Khiaw Bank Ltd. v. Hipparion (M) Sdn. Bhd.* [1988] 2 MLJ 62 but that case can be distinguished in that there was, in that case, a termination of the licence to occupy a premises and demand for possession which was not complied with but the licence to occupy the said property in this case has not been terminated and nor was there any demand for the delivery up of the said property.

I therefore dismiss the plaintiffs application. There will be no order as to costs.